

NOTICE

Decision filed 11/22/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110243-U

NO. 5-11-0243

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

DAVID WARREN,

Defendant-Appellant.

)
)
)
)
)
)
)
)
)
)

Appeal from the
Circuit Court of
St. Clair County.

No. 99-CF-1313

Honorable
Michael N. Cook,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying the defendant's motion for forensic DNA testing where the results of such testing had no scientific potential to produce new, noncumulative evidence which would significantly advance the defendant's claim of actual innocence.

¶ 2 David Warren (the defendant) appeals from the denial, by the circuit court of St. Clair County, of his motion for forensic DNA testing of certain items of evidence secured in relation to his trial for first-degree murder, of which he was convicted. The motion was filed pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2008)), which allows a convicted defendant to file a motion for forensic DNA testing on evidence that was secured in relation to the trial which resulted in his conviction but was not subjected at the time of trial to the testing which is now requested, or, although previously subjected to testing, can be subjected to additional testing utilizing a method that

was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results.

¶ 3 In order to proceed on the motion, the defendant must present a *prima facie* case that identity was an issue at his trial and that the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect. 725 ILCS 5/116-3(b) (West 2008). If such a *prima facie* case is established, the circuit court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process, upon a determination that (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant and (2) the testing requested employs a scientific method generally accepted within the relevant scientific community. 725 ILCS 5/116-3(c) (West 2008).

¶ 4 Because we determine, as did the circuit court, that the results of requested testing have no scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence, we affirm the denial of the defendant's motion. We set forth only those facts necessary to our disposition.

¶ 5 At the conclusion of a jury trial, the defendant was found guilty of the 1999 first-degree murder of Charisma Thomas. On March 11, 2002, the defendant was sentenced to serve 45 years in the Department of Corrections. This court affirmed the defendant's conviction and sentence on direct appeal. *People v. Warren*, No. 5-02-0273 (Oct. 12, 2004) (unpublished order under Supreme Court Rule 23).

¶ 6 At his jury trial, the defendant denied that he was the murderer and offered a weak and partial alibi defense. He was tied to the murder by circumstances and by the presence of his DNA on the tip of a screwdriver which the victim, who had been brutally beaten to death with a blunt object, had presumably used to defend herself. The circumstances weighing against the defendant were his presence in the vicinity at the time of the murder and the fact that he lived in the same vicinity. The victim's mother testified that the victim often carried a screwdriver with her for protection. A screwdriver was found at the murder scene and testimony revealed that blood on the tip contained the DNA of the defendant, the victim, and an unknown third person. The defendant was seen to have a bloody cut on his hand shortly after the murder occurred. When questioned by police shortly after the murder, the defendant had a cut on his finger and a cut on his face, for which he gave inconsistent explanations. On direct appeal, we affirmed that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt.

¶ 7 On February 9, 2006, the defendant filed a *pro se* motion to allow DNA testing of certain items of evidence from his trial. On March 13, 2006, counsel was appointed to represent the defendant on the motion, with leave to file an amended motion.

¶ 8 On April 30, 2007, through counsel, the defendant filed an amended petition seeking forensic DNA testing of items from a "sexual assault kit" used on the victim during autopsy, including oral and rectal swabs, head and pubic hair combings, and fingernail scrapings. The motion alleged that these items had not been tested for trial and that testing would reveal that the defendant's DNA was not present but that the DNA of an unknown person was present, "thus establishing Defendant's innocence." The motion also sought the testing of blood

found on the tip of a screwdriver using methods which are now available but were not available at the time of trial. This testing would reveal that the DNA on the screwdriver did not match that of the defendant. The motion did not indicate the type of testing that would be done.

¶ 9 The State filed a motion to dismiss on May 31, 2007, on the basis that further testing would not produce new, noncumulative evidence materially relevant to the defendant's claim of actual innocence and, with respect to the screwdriver which had been previously tested, the defendant had not specified what type of testing he wished to conduct that had not been available at trial and that was generally accepted in the relevant scientific community.

¶ 10 On July 25, 2007, the defendant filed a motion for appointment of an expert to review the items of evidence secured in relation to the defendant's trial to determine whether it was possible to test their DNA using technology that was not available at the time of trial.

¶ 11 On March 6, 2008, the State's motion to dismiss the defendant's amended petition for DNA testing came on for hearing. The State argued that the screwdriver could not be tested because any DNA had been consumed in the testing performed before trial. Prior to trial, the defendant had been advised that the State's testing of the blood on the tip of the screwdriver would consume all of the blood, leaving nothing behind for the defendant's expert to test. The defendant had consented to this procedure.

¶ 12 The defendant argued that an expert using current technology might be able to find sufficient DNA to test. The court concluded that it could not decide the motion to dismiss without first appointing an expert for the defendant to examine the screwdriver and determine whether there are new testing methods that were not available in 1999 and whether

there is sufficient DNA present to conduct such a test. The defendant's motion for appointment of an expert was granted for the limited purpose of inspecting the screwdriver, the swab containing DNA from the tip of the screwdriver, and the DNA extract from the tip of the screwdriver to determine whether there is sufficient residue DNA to be tested, and to provide to the court information as to what methods of testing are available today that were not available at the time of trial.

¶ 13 On July 15, 2009, the court entered an order giving the defendant 28 days to file a formal motion requesting leave to perform DNA testing on specific items of evidence. The motion was to include a description of the evidence to be tested, a description of the tests to be performed, and the cost of testing.

¶ 14 In response, the defendant filed, on August 11, 2009, a motion for forensic testing. The motion sought testing of the item of evidence labeled "3A, Cloth only," believed to be the remains of the original cotton swab that was used to remove DNA from the screwdriver, the tip of the screwdriver, and the swab labeled "Blood-Tip-Screwdriver." The motion sought to test these items using "newer test kits on the market: the Identifiler and/or MiniFiler," neither of which had been available at the time of trial. These test kits were designed to work upon extremely small quantities of DNA. Although no mention was made in the motion of the items contained in the sexual assault kit, the parties agreed at the hearing on the State's motion to dismiss that this omission was inadvertent and that both parties were prepared to discuss testing of the items contained in the sexual assault kit.

¶ 15 On September 15, 2009, the State filed a motion to dismiss the defendant's motion for forensic testing. The State argued that the defendant had not demonstrated that the new

testing would produce new, noncumulative evidence materially relevant to his assertion of actual innocence. Since the tip of the screwdriver had already been tested, it was unlikely that any blood remained and that a new test would produce any scientific evidence. Furthermore, fingerprint testing had been performed on the screwdriver after the DNA testing and therefore any remaining DNA would be contaminated and the results of testing compromised. Even if DNA was present and tested, if it showed an additional unknown profile, this would only be cumulative to the unknown profile already discovered on the screwdriver. The same arguments were made with respect to the cloth and the stick used in the previous DNA testing.

¶ 16 A hearing was held on the motion to dismiss on May 18, 2011. At the hearing, the State stipulated that the defendant had presented a *prima facie* case that identity had been an issue at his trial and that the evidence sought to be tested had been subject to a sufficient chain of custody to ensure that it had not been substituted, tampered with, replaced, or altered in any material respect. The State argued, however, that the defendant had not demonstrated that any testing could produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. With respect to the screwdriver, the State argued that it had been subjected to fingerprint analysis using nonclean techniques and therefore any DNA present thereon was contaminated. Furthermore, the original testing had revealed the presence of DNA belonging to an unknown individual and even if further testing revealed the presence of additional DNA it would be merely cumulative to that already discovered. Finally, all of the blood on the screwdriver had been consumed in the previous testing so any new testing would reveal nothing.

¶ 17 With respect to the items from the sexual assault kit, the State pointed out that the vaginal swab from that kit had been tested for DNA and revealed an unknown profile but excluded the defendant. Accordingly, any further testing of items from the sexual assault kit could only produce cumulative results by possibly revealing unknown DNA. Furthermore, there is no evidence, and the State has never contended, that the victim was killed during a sexual assault. She was found fully clothed. Finally, with respect to scrapings taken from the victim's fingernails, the State argued that even if testing did not reveal the presence of the defendant's DNA in those scrapings, it would add nothing to the defendant's claim of actual innocence because the defendant's DNA was found on the screwdriver, linking him to the crime. If unidentified DNA was found, it would be cumulative to the unidentified DNA found on the screwdriver and vaginal swab.

¶ 18 The defendant argued that if DNA was found on the untested items from the sexual assault kit that matched the unidentified DNA found on the tip of the screwdriver, it would be materially relevant to the defendant's claim of actual innocence, even though it may not completely exonerate him. With respect to the items relating to the screwdriver, the defendant argued that they should be tested using two new tests, the Identifiler and the MiniFiler, which were designed to work on very small amounts of DNA.

¶ 19 The defendant also wanted to be sure that the unidentified DNA profiles found on the tip of the screwdriver and the vaginal swab were being regularly run through the State's DNA indices to see if they matched any known DNA. The State responded that this was routinely done on a weekly basis by the Illinois State Police.

¶ 20 The circuit court denied the defendant's motion, finding that the defendant had failed

to show that further testing had the scientific potential to produce new, noncumulative evidence that was materially relevant to his claim of actual innocence. The discovery of more unidentified DNA would be cumulative to evidence introduced at trial, and further testing of any of the items would not aid the defendant's claim of actual innocence.

¶ 21 On appeal, the defendant's argument is essentially that newer testing methods are more reliable than the method used in the defendant's trial and might result in the defendant's being excluded as the source of the DNA on the screwdriver. He also argues that testing the items from the sexual assault kit that were not previously tested might reveal the DNA of a possible attacker other than the defendant. If the testing of the fingernail scrapings excluded the defendant's DNA it could mean that the victim struggled with and was killed by someone other than the defendant, significantly advancing his claim of innocence. Furthermore, running the results of further testing through the State's DNA indices might generate a match other than the defendant, constituting new, noncumulative evidence that someone other than the defendant killed the victim.

¶ 22 Because the circuit court's decision on a section 116-3 motion for forensic testing is not based upon its assessment of the credibility of witnesses but on its review of the pleadings and the trial transcripts, our review of that decision is *de novo*. *People v. Henderson*, 343 Ill. App. 3d 1108, 1115 (2003).

¶ 23 Evidence which is "materially relevant" to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim. *People v. Savory*, 197 Ill. 2d 203, 213 (2001). Accordingly, as the statute explicitly states, section 116-3 is not limited to situations in which scientific testing of a certain piece of evidence would completely

exonerate a defendant. *Savory*, 197 Ill. 2d at 214. Determining whether the evidence is materially relevant to the defendant's claim of actual innocence requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence the defendant is seeking to test. *Savory*, 197 Ill. 2d at 214.

¶ 24 There is no issue in the case at bar as to whether the defendant made out a *prima facie* case for testing. The State stipulated that identity had been an issue at the defendant's trial and that the items sought to be tested had been subject to a sufficient chain of custody.

¶ 25 Once a defendant has made a *prima facie* case, the court must determine whether the result of the testing has the scientific potential to produce new, noncumulative evidence which is materially relevant to the defendant's assertion of actual innocence, and that the testing requested employs a scientific method generally accepted within the relevant scientific community. 725 ILCS 5/116-3 (West 2008). Here, the circuit court determined that the result of the testing had no scientific potential to produce new, noncumulative evidence which is materially relevant to the defendant's assertion of actual innocence and denied the defendant's motion. Our review of the evidence introduced at trial as well as our assessment of the evidence the defendant is seeking to test leads us to the same determination.

¶ 26 With respect to the items relating to the screwdriver, it is evident that any blood containing DNA was consumed in the State's original testing prior to trial. The defendant had been advised prior to trial that this would happen and consented to it. Although the defendant sought and was granted the appointment of an expert to examine the items to determine if sufficient blood remained to be tested, no report of that expert was ever filed

with the court, nor was her testimony presented at the hearing. We can only assume that the result of her analysis was not favorable to the defendant's position.

¶ 27 Furthermore, the defendant presented no evidence or authority to the circuit court that the new testing he sought had the scientific potential to exclude him as the donor of the DNA found on the screwdriver which the State's testing attributed to him. It seems to us that this is the only result of further testing that would significantly advance the defendant's claim of actual innocence. Despite having been granted the appointment of an expert to examine the items of evidence and report to the court as to what methods of testing were available today that were not available at the time of trial, no such report was filed and no evidence was presented at the hearing. Again, we can only assume that the expert's analysis was not favorable to the defendant's position.

¶ 28 With respect to all of the items sought to be tested, both from the screwdriver and the sexual assault kit, unknown DNA had been found in the State's original testing on the tip of the screwdriver and on a vaginal swab taken from the victim. Further testing which found more or different unknown DNA would be merely cumulative and would not *significantly* advance the defendant's claim of actual innocence. The defendant had been free to argue at his trial that the victim had been killed by an unknown assailant other than the defendant whose blood was present on the tip of the screwdriver and/or whose semen had been found in her vagina. Finding additional unknown DNA would not significantly advance this claim.

¶ 29 Furthermore, the defendant had the opportunity at trial to compare the unknown DNA on the screwdriver to the unknown DNA in the vaginal swab to see if they matched, and if they did, to present this evidence at trial. He did not do so.

¶ 30 Finally, as the State points out, there was no evidence that the victim was sexually assaulted or that she was killed during the course of a sexual assault. She was found fully clothed. Accordingly, evidence from the sexual assault kit is not materially relevant to the identity of her killer or to the defendant's claim of actual innocence.

¶ 31 The defendant has failed to show that the result of the requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to his claim of actual innocence. Accordingly, we affirm the circuit court's denial of the defendant's section 116-3 motion for forensic DNA testing.

¶ 32 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 33 Affirmed.